

FEDERAL STANDARD ABSTRACT

TITLE NEWS

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Real Estate Transfer Tax - Condominium Conversions

On March 6, 2012, the NYS Dept. of Taxation and Finance resolved an inquiry regarding the applicability of the real estate transfer tax (RETT) to a condominium conversion where there were no proper sales. The property was owned by an LLC. Its operating agreement directed it to build out a shopping mall, convert it into a two-unit condominium and convey (or disburse) a condo unit to each one of its two members. The inquiry asked whether the conveyance or disbursement of the LLC of the two condo units to its two members would trigger RETT.

The advisory opinion issued by the Department concluded that RETT would not apply because the transaction would be exempt under the “mere change of identity or form of ownership” exemption, since the beneficial ownership behind the LLC would be the same as the ultimate title owners. The opinion is particularly interesting because the author took the time to go over past opinions regarding RETT and condominium conversions. The advisory opinion is available here: http://www.tax.ny.gov/pdf/advisory_opinions/real_estate/a12_1r.pdf

Mortgage Tax - Bail Bonds

In another opinion issued on March 6, 2012, the NYS Dept. of Taxation and Finance resolved an inquiry regarding the applicability of the mortgage recording tax (MRT) to a mortgage securing a bail bond. A bail bond was purchased giving the surety (the bond issuer) a mortgage

payable in the event the surety had to pay out on the bond. It appears that the inquirer attempted to draw a distinction between a regular mortgage loan, which secures an existing obligation, and a bond mortgage, which secures a contingent obligation.

The Department noted that the definition of mortgage under the Tax Law included as a mortgage liens on real property “being used as a security for the payment of money *or the performance of an obligation . . .*” (Tax Law §250; emphasis added). In view of the foregoing the opinion concluded that the bond mortgage fell neatly within the tax definition of mortgage, and therefore MRT applied. The opinion is available here: http://www.tax.ny.gov/pdf/advisory_opinions/mortgage/a12_2r.pdf

Title Insurance Payout Calculation

While re-developing his property, an owner discovered a six-inch encroachment onto his property, which had not been excepted in his owner’s title insurance policy, and which allegedly prevented him from carrying out his development plans. The owner put a claim with this title insurer and the title insurer, pursuant to the terms of the policy, offered to pay the difference between the value of the property as insured (i.e. without the encroachment) and the value of the property subject to the encroachment. Based on the opinion of an appraiser, the difference was \$6,000.

The owner rejected the offer and sued the insurer claiming a much larger amount. In his view, the insurer owed the difference between the value of his

property re-developed as planned and the value of the property undeveloped and subject to the encroachment. His figure amounted to \$341,000; almost twice the insured amount, which was \$175,000.

The court noted that a title insurance policy is a contract of indemnity by which the parties stipulate the liability of the insurer. The court noted that the policy excluded liability for consequential damages, and that plaintiff's calculation of damages (i.e. the lost opportunity to re-develop the property) was a claim for consequential damages. Consequential damages, noted the court, might be appropriate if the insurer had breached the policy itself. But since the insurer had acted in accordance with the policy, the insurer had not breached the policy and therefore the insurer was not subject to consequential damages. Hence, the insurer's form of calculation (i.e. the value difference in the value of the property with and without the encroachment) was the correct measure of payout under the terms of the policy. *Gomez v. Fidelity Nat'l Title Ins. Co. of*

NY, 34 Misc.3d 1233(A) (Queens Cty. Sup. Ct., 3/01/2012).

Mortgage Foreclosure and Deficiency Claim

A mortgage lender foreclosed on property and bought it at the judicial sale by bidding the unpaid debt. Thereafter, it appears that the lender sued the prior owner for recovery of monies because the prior owner had failed to apply an insurance payout to the repair of fire damage, as required by the terms of the mortgage. The court agreed that the debt owed to the mortgagee was in excess of the value realized at the foreclosure sale. However, the court also noted that "RPAPL 1371(3) provides that if no motion for a deficiency judgment is made, the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist." *Option One Mtg. Corp. v. J.P. Morgan Chase & CO., 2012 WL 787506 (N.Y.A.D. 1 Dept, 03/13/2012)*

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